

REMARKS OF INDIANA SUPREME COURT JUSTICE FRANK SULLIVAN, JR.,
AT THE INDIANA JUDICIAL CONFERENCE

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"The 1866 Milligan Decision: Important Then & Now"

Good afternoon and welcome. Steve Towne has just set the historical context of the most famous U.S. Supreme Court case ever from Indiana, Ex parte Milligan, and told you the personal history of the principal protagonist, Huntington, Indiana, resident Lambdin P. Milligan. My part of this afternoon's program is to tell you about the case itself. (This is not a presentation about the life and distinguished judicial career of Montgomery Circuit Court Judge Thomas K. Milligan, although I am sure that that too will be a topic for our legal history program some day.)

Before the United States Supreme Court in Ex parte Milligan was the question of whether a Southern sympathizer in Indiana – Milligan – could be tried before a military commission (rather than a civilian court) on charges of conspiracy against the United States. In holding Milligan's conviction for treason and his death sentence imposed by a military tribunal to be unconstitutional because military commissions could not try civilians, Justice David Davis famously wrote for the Court's majority:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

When Chief Justice Shepard asked me if I would present a paper at this conference on the subject of Ex parte Milligan, I readily agreed because I think the case is significant for at least three reasons:

As a matter of historical significance, Ex parte Milligan constitutes a decision immediately following the Civil War by the Lincoln Supreme Court holding that a Southern sympathizer, Milligan was entitled to Constitutional protections. In fact, the opinion's author, Justice David Davis, had not only been appointed by President Lincoln, he had been Lincoln's floor manager at the 1860 Republican nominating convention, and was one of the founders of the Republican Party.

As a matter of contemporary significance, Ex parte Milligan raises issues faced today in the prosecution of alleged post-September 11 terrorists. Indeed, the U.S. Supreme Court has discussed or at least cited Ex parte Milligan in three post-September 11 opinions – Hamdan v. Rumsfeld, Hamdi v. Rumsfeld, and Rasul v. Bush.

As a matter of jurisprudential significance, Ex parte Milligan contains majority and dissenting opinions in, to use Chief Justice Rehnquist's description, "sharp disagreement" with each other. Although all nine justices agreed that Milligan was entitled to relief, four justices disagreed with the reasoning of the other five in an era before 5-4 Supreme Court decisions became commonplace.

Of course, each of these three themes could be the subject of a full lecture in itself and so I can only touch on each in the 30 minutes I have allotted to me. I'll try to identify some source material as I go along for those of you who might like to explore one or more of these areas further.

Milligan's Historical Significance

The story of Southern sympathy in Indiana during the Civil War is well known. Many Hoosiers had roots in Kentucky, Maryland, Virginia, and North Carolina. There were also strong economic and agricultural bonds between the "Northwest" states of Indiana, Ohio, and Illinois and the Southern states. Throughout the war, thriving clandestine trade took place between the Northwest and the South along the Mississippi River. The Southern sympathizers were Democrats. To the Republicans, they were Copperheads.

Prominent among the Indiana Democrats was Huntington lawyer Lambdin P. Milligan. Steve Towne told you much about his most interesting story. For my purposes, it is sufficient to remember that Milligan had sought the Democratic nomination for governor of Indiana in 1864 and that although he was considered a Southern sympathizer, he was a civilian, that is, to use today's parlance, not an enemy combatant.

In October, 1864, Milligan was seized and arrested by the military power of the United States under the authority of General Alvin P. Hovey, the military commander of Indiana. Milligan was not indicted by a grand jury, nor charged in a court of law; he was simply taken by General Hovey's men and imprisoned.

Instead, Milligan was brought before a military commission – not a court – on a charge of conspiracy against the United States, alleging that he had denied the authority of the Government to draft men into the army, that he had plotted to overthrow the Government by seizing arsenals in Indianapolis and two other locations and by releasing Confederate prisoners held there. Milligan was also charged with affording aid and comfort to the rebels, inciting insurrection in Indiana, disloyal practices, and violation of the laws of war.

The military tribunal was convened in December, 1864, in Indianapolis. An apparently complete transcript of the proceedings exists and the rhetoric is florid.

A speech of Milligan was offered into evidence: "If the war was right and the draft was right, and if good citizens believed the war was right, they would not grumble about the draft. The war is not right. And under the Constitution, the President has no power to coerce a State. I ask you: will those who have entered the army look in the future, for their laurels, to battles such as Bull Run, Chicamauga and Red River? I implore you to consider the condition of your wives and children at home – destitute and dependent on the charity of their neighbors. Do you consider it your duty to make such a sacrifice?"

To which the military prosecutor responded: "The only difference between Mr. Milligan and the most bitter rebel of them all, was that one was using his arms to enforce his principles, the other with his voice and pen attempted to sustain their armies in that cause, weakening the cause of the Government, and adding numbers to the rebel ranks. I ask what more effective mode could have been chosen to give aid and sympathy to the enemy?"

The military commission convicted Milligan and sentenced him to death in January, 1865. His energetic lawyer, Joseph Ewing McDonald, launched both a political and a legal campaign to save him.

President Lincoln had been re-elected in November by a wide margin and Union troops were scoring victories on the battlefield to such an extent that there was optimism that the war would soon end. McDonald is said to have met with Lincoln personally to urge reversal of Milligan's death sentence as a step toward national reconciliation. This strategy was dashed with Lincoln's assassination on April 15.

The legal strategy was to seek a writ of habeas corpus from the federal court. Under procedural rules in effect at the time, the case was heard in Indianapolis by the Federal District Judge David McDonald – no relation to Joseph Ewing McDonald – and the United States Supreme Court Justice for the circuit, Justice David Davis.

Milligan's argument was that a military commission had no authority to try a civilian, at least in a jurisdiction which was not in the theatre of war and where the civilian courts were open. There is historical support for the proposition that both Judge McDonald and Justice Davis agreed that Milligan had been illegally tried but feared that if they granted the writ, General Hovey would ignore their decision and put Milligan to death anyway. In any event, again under the prevailing procedural rules, if the two judges could not agree, the case would be automatically transferred to the United States Supreme Court. And whether engineered or not, that is what happened – on May 10, nine days before Milligan was to be hanged, the two judges announced that they disagreed as to whether Milligan was entitled to relief. This had the effect of staying the execution; the military did not dare hang a man whose appeal was pending before the nation's highest court. (As it turned out, on the eve of the executions, President Andrew Johnson first

postponed and then ultimately commuted the death sentence to life imprisonment at hard labor.)

As noted above, the Supreme Court in 1866 held that the military commission had not had jurisdiction to try Milligan. All nine justices were of this view. But there were two sharply divergent rationales. Justice Davis spoke for a majority of five justices in holding that Milligan's trial before the military commission was unconstitutional. In the majority's view, military trials of civilians when civil courts are open violate constitutional guarantees of indictment by a grand jury and public trial by an impartial jury. As long as civil courts are open, the majority held, the Constitution permits neither the president nor Congress to authorize the trial of civilians by military commission.

A minority of four led by Chief Justice Salmon P. Chase concurred that the military commission did not have jurisdiction to try Milligan. But these justices were of the view that when the nation is at war, it would not violate the Constitution for Congress to provide for trials by military commissions of persons accused of conspiracy like Milligan. The reason, they said, that Milligan's trial was improper was not because it was unconstitutional but because such trials were not authorized by Congress. These justices were of the view that if Congress concluded that civil courts were incapable of punishing treason, Congress could authorize the military to try offenders.

We have become so accustomed in our own age to view the voting of members of the United States Supreme Court in terms of the politics of the Presidents who appointed them that my discussion of Milligan would seem incomplete somehow if I did not give you a similar rundown.

At the time of Milligan, five members of the Court had been appointed by Lincoln, four by his Democratic predecessors. Davis, of course, had been appointed by Lincoln but the four justices who joined his opinion were three of the four Democratic appointees. The opinion of Chief Justice Chase, himself a Lincoln appointee, was joined by the remaining Democratic appointee and the two other Lincoln appointees. As such, a majority of the Democratic appointees favored the majority's approach; a majority of the Lincoln appointees favored Chief Justice Chase's. To the nation as a whole, the majority opinion was seen as highly favorable to the Democrats, for reasons that we will return to in a few minutes.

Milligan's Contemporary Significance

Immediately after September 11, 2001, Congress authorized the President to use military force against those he determined "planned, authorized, committed or aided" the terrorist attacks on New York and Washington. Four cases have reached the United States Supreme Court since then that echo the themes of the Milligan litigation -- the use of military commissions when civil courts are available. And the high court has granted review in two more cases for next term.

One such case decided in 2006 was that of Salim Ahmed Hamdan. Hamdan was a Yemeni national, captured by militia forces in Afghanistan and turned over to the U. S. military, which, in 2002, transported him to prison in Guantanamo Bay, Cuba. More than a year later, the President deemed Hamdan eligible for trial by military commission for then-unspecified crimes. After another year, he was charged with conspiracy "to commit . . . offenses triable by military commission." In habeas and mandamus petitions, Hamdan asserted that the military commission lacked authority to try him because no congressional enactment supported trial by military commission for conspiracy.

Last year, the Supreme Court ruled in Hamdan's favor. It held that the military commission at issue was not expressly authorized by any congressional act. Neither the authorization of the use of military force granted to the President immediately after September 11 nor the subsequent Detainee Treatment Act of 2005, the Court said, could be read to provide the necessary specific, overriding authorization for a military commission convened to try Hamdan. Absent a more specific congressional authorization, the Court saw its task as assessing whether Hamdan's military commission was justified under the Constitution and applicable laws, including the law of war. The Court held that the military commission at issue lacked the power to proceed because its structure and procedures violated both the Uniform Code of Military Justice and the four Geneva Conventions signed by the United States in 1949.

The Hamdan decision cites to Milligan at least a half dozen times. But as you can see from my brief summary of the holding in Hamdan, the Court does not say about Hamdan's military commission what Justice Davis said about Milligan's. Hamdan's military commission was improper because there was no specific congressional authorization for it; Milligan's was improper because it violated constitutional guarantees.

The very clear implication of the Hamdan holding is that if only Congress had provided a sufficiently explicit authorization, Hamdan could indeed be tried by military commission rather than in a civilian court. But wouldn't this violate Milligan?

The short answer to this question is that, while references to the rhetoric and aspirations of Justice Davis's Milligan opinion are frequent even to this day, its holding was dramatically cut back in the World War II decision, Ex parte Quirin. During the war, eight men in German military uniforms and carrying explosives and other supplies, landed from German submarines at night on the East Coast. They buried the uniforms and supplies, and proceeded, in civilian dress, to various places in the United States under instructions from the German High Command to destroy war industries and war facilities in the United States. They were captured, tried by military commissions, convicted of treason, and sentenced to death. They appealed their convictions and sentences, invoking Milligan's pronouncement that trial by military commissions "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." The Supreme Court rejected this contention, concluding that Milligan was limited to its facts: "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as – in circumstances found not there to be present, and not involved here

— martial law might be constitutionally established.” Because the appellants in Quirin were belligerents, they were subject to the authority of military tribunals.

Perhaps your analysis of Milligan with the gloss imposed by Quirin is the same as mine: that while Milligan remains an important case, its precedential value is not found in the majority opinion of Justice Davis but in the dissenting opinion of Chief Justice Chase to the effect that explicit statutory authority is necessary before a person can be tried by a military commission when civil courts are open. In fact, in Hamdan, the Court quotes approvingly from Chief Justice Chase's opinion at one point and cites to him by name a second time.

Let me make one final point here, simply because it has been the subject of a big story in the New York Times Magazine the week before last and is being frequently reviewed. There is a new book out called, "The Terror Presidency," written by a conservative legal scholar named Jack Goldsmith. Goldsmith was a senior official in the Justice Department under Attorney General Ashcroft, and was responsible for providing legal advice on issues related to the war on terror. One of the themes of Goldsmith's book, at least according to the Times's article, is that Goldsmith constantly counseled the Administration that it needed authority from Congress for the way in which it wanted to detain and try suspected terrorists. His advice was rejected; Hamdan was the result.

Milligan's Jurisprudential Significance

When we read Justice Davis's famous words today, we cannot help but be filled with pride as judges and lawyers:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.

No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Such a doctrine leads directly to anarchism or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

How great a statement of what we as judges and lawyers and Americans believe in is that!

But as wonderful and inspiring as Justice Davis's words are, I have already alluded to the fact that the holding of his opinion has not stood the test of time. And I would like to conclude my remarks this afternoon by looking at Milligan from a jurispru-

dential perspective because I think it is there that this important case has special meaning for judges.

Return with me to Chief Justice Chase's dissenting opinion. After a careful analysis of why existing statutes did not authorize Milligan's trial by military commission, he turns to the reason for his dissent. The majority, he points out, "asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it." With this proposition, as I noted earlier, Chief Justice Chase disagreed. He went on to make a strong and cogent argument as to why, in fact, Congress had and needed to have such power.

Chief Justice Chase made a profound jurisprudential point as well. Given that there was no statutory authority for Milligan to be tried by military commission, there was no reason for the justices to deal with the question of whether such statutory authority, if it did exist, violated the Constitution. This is in accord with the long-recognized view that a Court should decide cases on non-Constitutional grounds if at all possible. This view is most frequently credited to Justice Brandeis's concurring opinion in Ashwander v. Tennessee Valley Auth., but it dates itself all the way back to Chief Justice John Marshall's opinion in Fletcher v. Peck.

Chief Justice Rehnquist has an excellent discussion of this point in his book about civil liberties during wartime, "All the Laws but One," and I commend not just the discussion but the entire book to you.

The reason given by Chief Justice Marshall -- called "sound advice" by Chief Justice Rehnquist -- that courts should decide cases on Constitutional grounds only as a last resort, is that it is a highly "delicate" matter to declare that the members of the legislative branch have taken illegal action. So "delicate," in fact, that the legislature might retaliate against the Court or that the Court might simply lose credibility by being viewed as overstepping its own Constitutional authority.

Certainly there was a strong negative public reaction to Justice Davis's opinion in Milligan. One historian has written that, "This famous decision has been so long recognized as one of the bulwarks of American liberty that it is difficult to realize now the storm of invective and opprobrium which burst upon the Court at the time when it was first made public."

Part of the reaction was grounded in the raw memory of the Dred Scott decision, written by Chief Justice Chase's predecessor, Chief Justice Roger Taney. Remembered today primarily for holding that blacks were property protected by the Constitution and not citizens of the United States, the court also had held that Congress had exceeded its authority when it forbade or abolished slavery in some of the nation's territories. The court did no less than hold the Missouri Compromise unconstitutional.

Republicans, remembering that the court had held the Missouri Compromise to have been beyond Congress's power, smoldered at being told that Congress also had no

power to authorize the use of military commissions. And just as there were real consequences for real people from the Dred Scott decision, so too with Justice Davis's opinion in Milligan. By late 1866, when the Milligan opinions were released, violence against former slaves in the South was growing and most Republicans believed that military courts were essential to provide security to former slaves. Conversely, President Andrew Johnson used Milligan as a justification to reduce military authority in the occupied states, further inflaming Republican opinion against the Court.

From time to time, I am asked whether I think a particular provision of law violates the United States or Indiana Constitution. Many times, I have to say, it is hard to tell. Despite what a lot of people say, I have a mighty hard time discerning the "intent of the Framers." I even have a hard time finding very much "plain language."

One thing that cases like Dred Scott and Milligan teach me, however, is that when a Court declares a statute to be unconstitutional, the practical effect of that declaration is to place the subject matter of that statute beyond political compromise. After Dred Scott, the North and the South could no longer reach political compromise on whether or not a new territory would be slave or free. After Milligan, the Congress could not compromise on whether there would be military commissions to protect former slaves in the South. Apart from whatever the "delicacies" of declaring a statute unconstitutional might be in terms of legislative-judicial branch relations, the most profound affect of such a declaration is that it constitutes the judiciary directly intervening in and interdicting the process of political compromise. The tragedies of the Civil War and Reconstruction are among the legacies of such intervention and interdiction.

Conclusion

Ex parte Milligan, decided by the United States Supreme Court in 1866, remains to this day the most famous United States Supreme Court case ever from Indiana. Its significance was great at the time as our nation grappled in the aftermath of calamity. And it retains contemporary significance, being cited with regularity by today's Court as we grapple with the aftermath of another calamity. And to us as judges, I suggest, the majority and dissenting opinions in Milligan well illustrate two different jurisprudential approaches -- one proper and one improper -- for exercising the power given to us by the Constitution to review the legality of legislative enactments.

Thank you very much.